85-652

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PAUL A. STONE,

PETITIONER,

v.

MERIT SYSTEMS PROTECTION BOARD and

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Question Presented

Civil Service Commission regulations allowed federal competitive-civil-service employees an appeal to the Commission, with evidentiary trial-type hearing, from reductions in rank. The Commission's interpretation of the regulations excluded from appealability reductions voluntarily initiated by an employee. The respondent Department of Health and Human Services reduced Petitioner's competitive-civil-service rank purportedly at his request. Petitioner appealed to the respondent Merit Systems Protection Board (successor to the Commission) alleging that the reduction was without his consent. Was it a violation of due process of law for the Board to reject the appeal on the basis of evidence introduced by the Department and received by the Board, without notice to the Petitioner and without Petitioner's knowledge, which the

Board understood and decisively relied on as disproving Petitioner's allegation and proving that Petitioner voluntarily consented to the reduction?

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Reference to Reports of Opinions

The only reported opinion in this case is Kyle v. Interstate Commerce Commission, 197 U.S.App.D.C. 285, 609 F.(2d) 540 (1979), holding that the United States Court of Appeals for the District of Columbia Circuit did not have direct-review jurisdiction, under Title 5, United States Code, section 7703(b)(1), of the MSPB decision. See pages 6-7, below.

Grounds on Which the Jurisdiction of this Court is Invoked

The judgment of the United States Court of Appeals for the District of Columbia Circuit that is sought to be reviewed was entered on May 20, 1985 (it is not separately dated). Appendix, p. A.1.

Rehearing of the appeal to the Court of Appeals was denied by order entered July 19, 1985 (not separately dated). Appendix, p. A.72.

The statutory provision believed to confer on this Court jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is Title 28, United States Code, section 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Constitutional Provision, Statutes and Regulations Involved

This case involves the following cited constitutional provision, statutes and regulations:

Constitution of the United States of America, Fifth Amendment -- Appendix, p. A.74

5 U.S.C. (ed. 1976) §§ 7511-7512 -- Appendix, pp. A.75-A.77

5 U.S.C. (ed. 1976) § 7701 -- Appendix, pp. A.78-A.79

Executive Order 10988, January 17, 1962, 3 CFR (1959-1963 Compilation), pages 521-528 -- Appendix, p. A.80

5 CFR (ed. 1978) Part 772 -- Appendix, pp. A.82-A.100

5 CFR (ed. 1978) Part 752 -- Appendix, pp. A.101-A.104

Civil Service Reform Act of 1978, Public Law 95-454, section 902, 92 Stat. 1111, 1223 -- Appendix, pp. A.105-A.106

Statement of the Case

The events immediate to this case took place at the end of 1978 and the beginning of 1979, the period in which jurisdiction of civil servants' appeals from adverse personnel actions passed from the Civil Service Commission to its successor, the respondent Merit Systems Protection Board ("MSPB") under the Civil Service Reform Act of 1978 (P.L. 95-454, 92 Stat. 1111). Early in the case Petitioner contended that the applicable law was that of the Act, which went into effect generally on January 11, 1979, 90 days after passage. Id., section 907, 92 Stat. at 1227. However, the United States Court of Appeals for the District of Columbia Circuit upheld Respondents' contention that the applicable law is that preceding the Act. Kyle v. Inter-

state Commerce Commission, supra, 197 U.S.App.D.C. 285, 609 F.(2d) 540. The present petition conforms to the Court of Appeals' decision on that.

Petitioner was a nonprobationary competitive-service employee of the respondent Department of Health and Human Services ("HHS"). Administrative Record, pp. 14, 34 (C.A.App. 54, 60).[1] On December 6, 1978 he consented in writing to be transferred from his grade 17 position as a deputy assistant secretary to a grade 15 position that HHS officials sought to have established with the title "Senior Program Analyst". Administrative Record, pp. 40-45 (C.A.App. 45 et seq.), Appen-

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1. "(C.A.App. ___)" citations are to the Appendix filed by Petitioner in the United States Court of Appeals in the present action. They are parallel to the record citations that they accompany.

dix, pp. A.104-A.105 (in part). This was a nonstandard title, the standard titles for the occupational series involved being "Program Analyst" and "Program Analysis Officer". Defendant's Answers to Plaintiff's Interrogatories [District Court docket entry 11], Answer 1.

On January 16, 1979 Petitioner received a notification dated December 21, 1978 that, effective December 17, 1978, he was reduced to grade 15, step (i.e., salary level within the grade) 10, and assigned to a position matching in description that of the consent but with the title "Program Analyst Officer". Administrative Record, pp. 1-8 (C.A.App. 47-51 (in part)). The notification included a notation, "ACTION EFFECTED AT REQUEST OF EMPLOYEE". Administrative Record, p. 2 (C.A.App. 49).

On January 17 Petitioner protested the title, among other aspects of the HHS action, to HHS in writing and requested rescission of the notification of personnel action. Administrative Record, p. 57 (C.A.App. 46). And on January 29 he filed an appeal with MSPB. Administrative Record, p. 1 (C.A.App. 47), Appendix, p. A.104.

Petitioner's appeal petition to MSPB exhibited a copy of the HHS notification and alleged in part that the personnel action represented was done without Petitioner's consent.[2] Administrative Rec-

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2. Contrary to an impression derivable from the MSPB decision's description of the petition (Administrative Record, p. 35 (C.A.App. 61), Appendix, p. A.49), the petition did not allege that the lack of consent resulted from the timing of the notification of the personnel action. Administrative Record, p. 1 (C.A.App. 49), Appendix, pp. A.108-A.109.

ord, pp. 1-9 (C.A.App. 47-51 (in part)), Appendix, pp. A.104-A.105 (in part).

MSPB acknowledged the appeal with a letter saying in pertinent part, "We are considering the matter and will write you further when we have developed more information." Administrative Record, p. 10.

By letter dated March 1, 1979 enclosing a copy of the appeal petition, MSPB asked HHS for data on Petitioner's employment and told HHS, "You may submit evidence and comment in response to this letter." Administrative Record, pp. 11-12 (C.A.App. 52-53). Petitioner had no notice or knowledge of this letter. Plaintiff's Declaration in Support of Objection to Proposed Memorandum Opinion [District Court docket entry 30] (C.A.App. 32-33), Appendix, pp. A.107-

A.108; Administrative Record, p. 51 (C.A.App. 70)

HHS's response, dated March 29, 1979, supplied the data and enclosed a copy of Petitioner's December 6, 1978 consent, but with the position title specification in it altered by HHS to read "Program Analyst Officer" instead of "Senior Program Analyst."[3] Administra-

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3. This was one of three significant alterations in the copy. The second was insertion of "12 17 78" in a space provided for "Effective Date" of the personnel action, which was blank on the consent. Compare Administrative Record, p. 41 (C.A.App. following 45) with id., p. 18 (C.A.App. 56). This seems to have led the MSPB official who decided the appeal to discount an allegation in the appeal petition that the personnel action was illegally retroactive. Administrative Record, p. 35 (C.A.App. 62), Appendix, pp. A.49-A.50. It may also have been the ultimate source of misunderstandings on the subject during the present action. See, e.g., Memorandum Opinion [District Court docket entry No. 31], p. 7 (C.A.App. 40), Appendix, pp. A.29-A.30. The third significant alteration was

tive Record, pp. 14-32 (C.A.App. 54-58 (in part)). Petitioner had no notice or knowledge of the HHS response. Plaintiff's Declaration in Support of Objection to Proposed Memorandum Opinion [District Court docket entry 30] (C.A.App. 32-33), Appendix, pp. A.107-A.108; Administrative Record, p. 51 (C.A.App. 70).

On April 18, 1979 MSPB, in reliance on the HHS response, issued a final and unappealable decision rejecting Petitioner's appeal. Administrative Record, pp.

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3 (cont.) entry of an HHS personnel office processing date of "12/5/8". Compare Administrative Record, loc. cit.. If the MSPB official understood that the other alterations were made by the HHS personnel office (as they were (Administrative Record, pp. 37-38 (C.A.App. 65-66))), the "12/5/8" processing date entry may have led him to infer (as he apparently did (Administrative Record, p. 35 (C.A.App. 61-62), Appendix, pp. A.49-A.50) that they were present on the consent when Petitioner signed it on December 6, 1978.

34-35 (C.A.App. 60-62), Appendix, pp. A.46-A.50; 5 CFR (ed. 1978) 772.309(b), Appendix, p. A.93.

Petitioner petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the MSPB decision, but in August 1979 the petition was dismissed for want of jurisdiction. Kyle v. Interstate Commerce Commission, supra, 197 U.S.App.D.C. 285, 609 F.(2d) 540.

Within a few days after the Kyle decision Petitioner had a conversation with an HHS personnel official which eventuated in a letter from the official to MSPB in March 1980 acknowledging the differences between the Petitioner's consent of December 6, 1978 and the copy on which MSPB based its decision. Administrative Record, pp. 37-48 (C.A.App. 65-66

(in part)), 54. On the strength of this letter, Petitioner suggested that MSPB reexamine its decision. Administrative Record, p. 49 (C.A.App. 67). In response, MSPB, by letter dated May 9, 1980 (Administrative Record, p. 50 (C.A.App. 68-69), Appendix, pp. A.54-A.57), referred Petitioner to the procedure for requesting discretionary reopening and reconsideration of a decision on the ground, among others, that, "New and material evidence is available that was not readily available when the decision of the appeals officer was issued" (5 CFR (ed. 1978) 772.310, Appendix, p. A.94; see Administrative Record, p. 36 (C.A.App. 62-64)). By letter dated May 28, 1980 Petitioner requested reopening and reconsideration on this ground, proffering the HHS personnel official's letter as the new, material evidence. Ad-

ministrative Record, pp. 51-102 (C.A.App. 70-75 (in part)).[4] In June 1981 MSPB denied the request (Administrative Record, pp. 106-107 (C.A.App. 79-80), Appendix, pp. A.58-A.62), and in April 1982 it reaffirmed the denial (Administrative

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4. The letter said near the beginning, "I hold a different view of the situation from that which your letter seems to reflect. I will briefly explain this before going on to address the subjects indicated in your letter. [Par.] My view of the situation is this: I appealed to the Merit Systems Protection Board giving proper notice to the Department of Health, Education, and Welfare. From then on, the proceedings were entirely bilateral between the Board and HEW without notice to me. HEW submitted a materially false document to the Board and the document figured prominently in the appeals officer's findings. In these circumstances the Board has a legal duty, shared with HEW, to initiate a reexamination of its decision. This duty exists independent of whatever right I may have to obtain reopening and reconsideration of the decision pursuant to the Board's published rules. [Par.] Without prejudice to this view or to its further assertion, I will now address the subjects indicated in your letter.

Record, pp. 114-115 (C.A.App. 85-86), Appendix, pp. A.66-A.68) in answer to further argument that Petitioner had submitted (Administrative Record, pp. 112-113 (C.A.App. 82-84)) following belated receipt of HHS's opposition to the original request (Administrative Record, p. 105; see id., pp. 108-111).

In April 1982, with followup letters in October and November, Petitioner wrote to the MSPB chairman criticizing the handling of the appeal and inquiring about applying for discretionary reopening and reconsideration by the MSPB Board members personally under 5 CFR (ed. 1978) 772.312(a)(1) (Appendix, p. A.99) on the ground that the MSPB actions in the case were so unfair as to present a policy implication meriting the Board members' attention. Exhibit 1 to Plaintiff's Memorandum in Support of Motion for Sum-

mary Judgment [District Court docket entry 21] (C.A.App. 87-95); Administrative Record, pp. 116-117 (C.A.App. 97-98). The reply from the secretary of MSPB was negative. Administrative Record, p. 118 (C.A.App. 98).

Petitioner commenced the present action in the United States District Court for the District of Columbia on June 14, 1983. As amended in November 1983, the complaint asked the District Court to compel MSPB to give Petitioner a hearing on whether he was entitled to a hearing on his appeal, or else a hearing on the merits of the appeal. (C.A.App. 6). In December 1983 both sides moved for summary judgment. Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment [District Court docket entry 19] (C.A.App. 8); Plaintiff's Mo-

tion for Summary Judgment [District court docket entry 21] (C.A.App. 17). On July 26, 1984 the District Court granted Respondents' motion and dismissed the complaint. Memorandum Opinion [District Court docket entry 31] (C.A.App. 34-43), Appendix, pp. 19-35; Order [District Court docket entry 32] (C.A.App. 44), Appendix, pp. A.36-A.37.

The District Court had jurisdiction of the action by virtue of Title 28, United States Code, section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

On appeal by Petitioner, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court order on May 20, 1985. Appendix,

pp. A.1-A.4. On July 19, 1985 the Court of Appeals denied a motion by Petitioner for rehearing. Appendix, pp. A.72-A.73.

The question sought to be reviewed, whether the action of the respondent MSPB was a violation of due process of law, was raised in both the District Court and the Court of Appeals.

In the District Court, Petitioner argued (Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment [District Court docket entry 22] p. 8):

> What is more, the Board's acceptance of a material ex parte submission from HHS was a violation of administrative due process, as is clear from the discussion in Doe v. Hampton, 566 F.(2d) 265, 271-272 n. 15 (D.C.C. 1977). Therefore, having accepted such a submission, and proposing to rely on it, as the Board actually did (Rec.p. 35), not

> merely as evidence that the plaintiff consented but that he did so voluntarily, the Board had an absolute, mandatory duty to convert the ex parte submission to a submission on notice by confronting the plaintiff with it before issuing a decision. The Board did not do so.[5]

In opposition to the memorandum opinion proposed by Respondents upon the District Court's decision to grant summary judgment, Petitioner argued (Plaintiff's Memorandum Objecting to Memorandum Opinion Proposed by Defendants [District Court docket entry 30], pp. 5, 8:

> The basic infirmity of the Memorandum Opinion proposed by the defendants, reflecting a basic infirmity of their position, is that it treats the plaintiff's appeal as though governed by cases in which
>
> (a) * * *
>
> (b) there was no question as to the appellant's having had full

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5. "271-272 n. 15" in the Doe v. Hampton citation was incorrect. The reference should have been "276-277".

opportunity to present evidence on the question of jurisdiction [citations].

The plaintiff's appeal is of neither of these types. * * * The appeal is not of type (b) because the plaintiff did not have any opportunity to be heard on the question of jurisdiction. On the contrary, the jurisdiction issue was raised and decided in ex parte proceedings excluding the plaintiff and in gross violation, therefore, of administrative due process. See Doe v. Hampton, 566 F.(2d) 265, 276-277 (D.C. Cir. 1977); Camero v. United States, 375 F.(2d) 777, 780-781 (Ct.Cl. 1967); Administrative Due Process, below, pp. 8-10).

* * *

Administrative Due Process

The plaintiff has not had a hearing either on the merits of the appeal or on whether he is entitled to such a hearing. Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, pp. 8-9; Memorandum in Support of Defendants' Motion for Protective Order, p. 1. He has been deprived of such a hearing on the basis of an ex parte submission (that of March 29, 1979) by HHS at the Board's invitation. Rec.pp. 11, 14-32, 34-36, 51. As earlier noted, that was a gross violation of due process. See p. 5, above.

Contrary to Petitioner's arguments, the District Court found, "There is nothing to suggest that the [MSPB] decision was in any way ... procedurally incorrect." Memorandum Opinion [District Court docket entry 31], p. 8 (C.A.App. 41), Appendix, p. A.32.

Petitioner pursued the question in the Court of Appeals, arguing there (Brief for Appellant, pp. 36, 50-51):

> Finally, the court erred in concluding that the MSPB decision was not procedurally incorrect. Denying the plaintiff a hearing on the basis of ex parte HHS evidence in contradiction or avoidance of the plaintiff's appeal allegations was a gross violation of procedural due process.
>
> * * *
>
> The other of the two bases, referred to above, of the District Court's decision was that the MSPB action was not arbitrary, capricious or procedurally incorrect. The question of arbitrariness will be addressed in Point II, below. The

> Court erred in believing that the MSPB action was not procedurally incorrect. The MSPB decision resulted from, in fact was totally based on, ex parte evidence by HHS, submitted at MSPB's invitation, contradicting the plaintiff's allegation that the personnel action was done without prior notice and consent, and avoiding (or considered by the appeals office as avoiding) the plaintiff's allegation that the action was illegally retroactive - and, moreover, the ex parte evidence was crucially false on these two matters (see p. 18, above). This was a gross violation of administrative due process, as is clear from the discussion in Doe v. Hampton, 184 U.S.App.D.C. 373, ___-___, 566 F.(2d) 265, 276-277 (1977). Cf. Bowman Transportation, Inc. v. Arkansas-Best Freight System Inc., 419 U.S. 281, 288 n. 7 (1974); Ralpho v. Bell, 186 U.S.App.D.C. 368, ___, 569 F.(2d) 607, 628 (1977).[6]

The Court of Appeals affirmed the decision "generally for the reasons stated in Judge Parker's opinion." Judgment, Appendix, p. A.3.

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6. "n. 7" in the Bowman case citation was incorrect. The reference should have been "n. 4".

Argument

The reason relied on for allowance of the writ of certiorari is that the Court of Appeals' affirmance of the District Court's judgment conflicted with this Court's statement in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n. 4 (1974):

> A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. Chio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292 (1937); United States v. Abilene & S.R. Co., 265 U.S. 274 (1924).

MSPB rejected Petitioner's appeal on the basis of evidence, the altered December 6, 1978 consent, introduced by HHS,

and accepted by MSPB, without notice to Petitioner and without his knowledge. In doing so, MSPB took the HHS evidence as disproving Petitioner's allegation of nonconsent to the personnel action appealed from and as proving that he voluntarily consented to it. Had MSPB instead given Petitioner an opportunity to respond to the HHS evidence Petitioner could not only have raised the position title issue but also have attempted to prove that the consent was not a voluntarily initiated request for a reduction in grade. Fitzgerald v. Hampton, 152 U.S.App.D.C. 1, 467 F.(2d) 755 (1972); Goodman v. United States, 123 U.S.App.D.C. 165, 358 F.(2d) 532 (1966); Dabney v. Freeman, 123 U.S.App.D.C. 16, 358 F.(2d) 533 (1965).

The due-process protected interest

of Petitioner is in his civil service rank and pay. Cf. Arnett v. Kennedy, 416 U.S. 134, 166 (1974) (removal from employment) (Powell, J., concurring); id. at 185 (White, J., concurring and dissenting); id. at 209 (Marshall, J., dissenting); Fitzgerald v. Hampton, supra, 152 U.S.App.D.C. 1, 467 F.(2d) 755. Reduction in grade is implicitly reduction in rank. Cf. Leefer v. Administrator, National Aeronautics and Space Administration, 117 U.S.App.D.C. 62, 543 F.(2d) 209 (1969)); FPM [Federal Personnel Manual] Supplement 752-1 (Attachment to Plaintiff's Declaration in Support of Objection to Proposed Memorandum Opinion [District Court docket entry 30], Subchapter S1-4 (pp. 21-23). Although there was no difference between the salary actually payable to a grade 17 employee and a grade 15, step 10, employee at the time

of the HHS personnel action, a difference resumed accruing on October 1, 1979 and the difference at present is $760 per annum. Cf. 5 U.S.C. (ed. 1976), Supp. II (1978), § 5332 note; op. cit., Supp. III (1979), § 5332 note; 5 U.S.C., Supp II (1984), § 5332 note.

The protected interest in rank and pay exists by virtue of Title 5, United States Code (ed. 1976), sections 7511, 7512 and 7701 (Appendix, pp. A.75-A.79); Executive Order 10988 (Appendix, pp. A.80-A.81), dated January 17, 1962; and 5 CFR (ed. 1978) Parts 752, subpart B, and 772. (Appendix, pp. A.82-A.104).

Title 5, United States Code, sections 7511 and 7512, a recodification of section 14 of the Veterans' Preference Act of 1944 (P.L. 78-359, § 14, 58 Stat. 387, 390-391, codified as 5 U.S.C. (ed.

1940), Supp. V, § 863, recodified and reenacted by P.L 89-554, 80 Stat. 378), applied to federal preference eligible employees (of whom Petitioner is not one). They provided that an agency might take adverse action, including reductions in rank or pay, against such an employee only for such cause as would promote the efficiency of the service and generally only after advance notice of the reasons and an opportunity to answer them. Section 7701 entitled a preference eligible to appeal an adverse action to the Civil Service Commission and to appear personally or through a representative under Commission regulations. Executive Order 10988 generally extended to all competitive civil service employees rights, including appeal rights, identical in adverse action cases to those provided to preference eligibles in accordance with

Civil Service Commission regulations or, regarding appeals, by the Commission.

5 CFR (ed. 1978) Part 752, subpart B, was part of the Civil Service Commission regulations to carry out the statute sections and the Executive Order. It provided for notice and opportunity to answer in reduction-in-rank or -pay cases at the employing agency level. Part 772 governed employee appeals from adverse actions under Part 752, subpart B, among others. Within Part 772, section 772.305(b) provided, "A representative of the [Federal Employee] Appeals Authority [of the Civil Service Commission] shall discuss all relevant representations and evidence with both parties and make the representations and evidence available to them for review." Section 772.307 entitled Part 752, subpart B, appellants to

a hearing before the Appeals Authority office with jurisdiction of the appeal and described the oral, evidentiary hearing procedures.

The Civil Service Commission published FPM [Federal Personnel Manual] Supplement 752-1 (Attachment to Plaintiff's Declaration in Support of Objection to Proposed Memorandum Opinion [District Court docket entry 30], which was in effect until January 10, 1979, to assist agency officials and employees and their representatives in interpreting or applying the law and regulations on adverse actions. Id., Introduction (p. 11). Subchapter S1-2 (pp. 18-19) of the FPM Supplement explained that "... reductions in rank or pay voluntarily initiated by an employee are by their very nature actions which do not require the

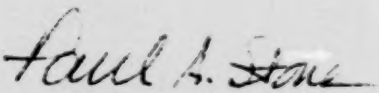
use of adverse action procedures." (p.18)

Conclusion

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals in this case.

Dated: October 17, 1985

Respectfully submitted,



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Judgment of the United States Court of Appeals for the District of Columbia Circuit filed May 20, 1985

NOT TO BE PUBLISHED. SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5678 September Term, 1984

Civil Action No. 83-01706

United States Court of Appeals

for the District of Columbia Circuit

FILED MAY 20 1985

GEORGE A. FISHER

CLERK

Paul A. Stone,

Appellant

v.

Merit Systems Protection Board

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF COLUMBIA.

Before: WALD and SCALIA, Circuit Judges, and McGOWAN, Senior Circuit Judge

J U D G M E N T

Plaintiff, an employee of the Department of Health and Human Services ("HHS"), appeals from District Judge Barrington D. Parker's dismissal of his complaint seeking to compel the Merit Systems Protection Board ("MSPB") to afford him a hearing in connection with his December 17, 1978 transfer from Deputy Assistant Secretary for Grants and Procurement (GS-17 step 4) to Program Analyst Officer (GS-15 step 10). See Stone v. MSPB, Civil No. 83-1706 (D.D.C. July 26, 1984). The issues presented have been accorded the Court's full consideration; they occasion no need for an

opinion. See D.C. Cir. R. 13(c). It is

ORDERED and ADJUDGED, by this Court, that the order granting summary judgment in favor of the MSPB and dismissing plaintiff's complaint is affirmed, generally for the reasons stated in Judge Parker's opinion. In addition, we note that any discrepancies between the terms of the plaintiff's consent to the transfer and the personnel action as actually effected pertained to matters reasonably understood to be within HHS's unappealable authority to alter once the transfer became effective; as such, they were too insignificant to invalidate the consent. See Jacob & Youngs v. Kent, 230 N.Y. 239, 241, 129 N.E. 889, 890 (1921). Moreover, the retroactivity of the transfer (to a date subsequent to plaintiff's consent to it) would only

have been impermissible if the transfer constituted an adverse action, see 5 C.F.R. § 752.202(f) (1978), which it did not because of the valid consent.

AFFIRMED.

Per Curiam

For The Court

George A. Fisher

Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Order of the United States Court of Appeals for the District of Columbia Circuit to Withhold Issuance of the Mandate, Filed May 20, 1985

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5678 September Term, 1984

Civil Action No. 83-01706

Paul A. Stone,

Appellant

v.

Merit Systems Protection Board

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAY 20 1985

GEORGE A. FISHER

CLERK

O R D E R

It is ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

George A. Fisher

George A. Fisher

Clerk

Opinion of the United States Court of Appeals for the District of Columbia Circuit in Kyle v. Interstate Commerce Commission, filed October 26, 1979

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1307

RICHARD W. KYLE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION,

RESPONDENT

No. 79-1345

ROBERT L. OSWALD, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and

MERIT SYSTEMS PROTECTION BOARD,

RESPONDENTS

No. 79-1505

PAUL A. STONE, PETITIONER

v.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Filed October 26, 1979

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

William Kanter, Joseph B. Scott and Marleigh Dover Lang, Attorneys, Department of Justice, were on the motions to dismiss, for respondents.

Myles J. Ambrose was on the opposition to the motions to dismiss, for petitioners in Nos. 79-1307 and 79-1345.

Paul A. Stone was on the opposition to the motions to dismiss, for petitioner, pro se in No. 79-1505.

Before WRIGHT, Chief Judge, and LEVENTHAL* and WALD, Circuit Judges.

Opinion per curiam.

PER CURIAM: In these cases, three federal employees have petitioned for review of the final orders of the Merit Systems Protection Board upholding agency adverse personnel actions. We dismiss for lack of jurisdiction because the savings provision of the Civil Service Reform Act precludes direct review in this court.

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* Circuit Judge LEVENTHAL did not participate in this decision.

I.

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, which became effective on January 11, 1979, provides for review of final orders or decisions of the Merit Systems Protection Board in the Court of Claims or a United States Court of Appeals, 5 U.S.C.A. § 7703(b)(1) (Supp. 1979). A savings clause, however, makes the Act inapplicable to cases instituted before its effective date:

> No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

Pub. L. No. 95-454, § 902(b), 92 Stat. 1111 (5 U.S.C.A. § 1101 note (Supp. 1979)). In the interest of affording

maximum rights to aggrieved employees, the Merit Systems Protection Board promulgated regulations construing the savings clause:

> No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

44 Fed. Reg. 38359, 38360-61 (1979) (to be codified in 5 C.F.R. §§ 1201.191(b)).

Each of these cases involves an employee who received notice of the proposed personnel action before, but had his case decided adversely by the Merit Systems Protection Board after, the Act

became effective.[1] Under the Merit Systems Protection Board's interpretation of the savings clause, each proceeding was pending when the Act became effective, and must therefore be reviewed judicially under prior law, which did not permit review in a Court of Appeals.[2]

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[1] In No. 79-1307, the Interstate Commerce Commission issued notice of the proposed removal of Richard W. Kyle from his position as Deputy Congressional Relations Officer on June 7, 1978. Kyle appealed on July 20, 1978, and the Merit Systems Protection Board rendered its decision on February 22, 1979.

In No. 79-1345, the ICC issued notice of its intention to remove Robert L. Oswald from his position as Secretary/Congressional Relations Officer on December 1, 1977. Oswald appealed on January 20, 1978, and the Board rendred its decision on March 1, 1979.

In No. 79-1505, Paul A. Stone was removed to a lower grade position within the Department of Health, Education and Welfare. HEW initiated the change on November 28, 1978; the Board received Stone's appeal on January 29, 1979 and entered its decision on April 18, 1979.

II.

The Board's interpretation is consistent with the language of the savings clause: "Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted." Pub. L. No. 95-454, § 902(b), 92 Stat. 1111 (5. U.S.C.A. § 1101 note (Supp. 1979)) (emphasis added). Moreover, the interpretation reaches a logical result. If prior law is to govern the administrative stage of a proceeding, it should govern the judicial review as well. To conclude otherwise may produce incongruous results or even preclude judicial review entirely for some employees. For example, the Act's thirty-day statute of limitation, 5 U.S.C.A. § 7703(b)(1) (Supp. 1979), may

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[2] 28 U.S.C. §§ 1346, 1491 (1976).

foreclose review for employees whose personnel actions could have been reviewed under the six-year limitation period of prior law, 28 U.S.C. §§ 2401, 2501 (1976).[3]

The Board's interpretation of the savings clause should be respected, in accordance with the judicial deference usually accorded to the interpretation made by the agency charged with a statute's administration. Udall v.

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[3] The thirty-day statute of limitations in the Act would be particularly likely to preclude review for employees whose cases had been decided by the Federal Employee Appeals Authority (predecessor of the Merit Systems Protection Board) before January 11, 1979, and who had relied on the six-year period in prior law. Another panel of this Court found that the savings clause of the Act also preserves prior law for judicial review of cases decided by the Appeals Authority before January 11, 1979. No. 79-1070, Leonard O. Davis v. Jimmy Carter, et al.; No. 79-1764, James W. Judkins v. Merit Systems Protection Board.

Tallman, 380 U.S. 1, 16 (1965). The Supreme Court recently reaffirmed this principle with its reminder that courts "are bound by the 'principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" Miller v. Youakim, 99 S. Ct. 957, 969 n.25 (1979), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). When an agency regulation is reasonably related to the purposes of the enabling legislation, its validity is to be sustained. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). The Board's regulation accomplishes the purpose of the savings clause: to ensure that all personnel actions initiated prior to January 11, 1979 are decided under prior law. It is therefore valid.

Accordingly, the personnel actions in these cases are to be reviewed under prior law, which prescribes the Court of Claims or the appropriate United States District Court as the proper forum. Because this Court lacks jurisdiction, the petitions for review are dismissed.

Order of the United States Court of Appeals for the District of Columbia Circuit, Dated August 28, 1979, Dismissing Petitioner's Petition for Direct Review of the Merit Systems Board Decision

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1505 September Term, 1978

Paul A. Stone,

Petitioner

v.

Department of Health, Education and Welfare

Respondent

United States Court of Appeals

for the District of Columbia Circuit

FILED AUG 28 1979

GEORGE A. FISHER

CLERK

BEFORE: Wright; Chief Judge: Leventhal and Wald, Circuit Judges

O R D E R

On consideration of respondent's motion to dismiss and of the response thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the petition for review herein is dimissed.

Per Curiam

Circuit Judge Leventhal did not participate in the foregoing order.

Memorandum Opinion of the United States District Court for the District of Columbia entered July 26, 1984

[District Court docket entry No. 31, Court of Appeals Appendix, pp. 34-43]

FILED

JUL 26 1984

JAMES E. DAVEY, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL A. STONE,)
)
Plaintiff,)
)
v.)
)
MERIT SYSTEMS PROTECTION BOARD,)
)
Defendant.)

Civil Action No. 83-1706

MEMORANDUM OPINION

In this proceeding, the plaintiff Paul A. Stone, an attorney appearing pro

se, has filed a pleading entitled "Complaint to Compel Agency Action." He seeks to compel the Merit Systems Protection Board (MSPB or Board) to grant him a hearing on whether he is entitled to a hearing or, in the alternative, to grant a hearing on the merits of his appeal before the MSPB.

The matter comes before the Court on the government's motion to dismiss the complaint for failure to state a claim upon which relief may be granted, Rule 12(b)(6) Fed. R. Civ. P., or in the alternative for summary judgment under Rule 56. The plaintiff has also filed a motion for summary judgment.

The underlying material facts are undisputed and for the most part are contained in an Administrative Record,[1]

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[1] The Administrative Record will be referred to herein as (A.R.__).

developed in proceedings before the MSPB. At those proceedings the plaintiff challenged certain decisions affecting his employment status at the Department of Health, Education & Welfare (HEW).

The Court has considered the pleadings of the parties, the Administrative Record, the oral argument of counsel and for the reasons set out below, determines that the government is entitled to summary judgment as a matter of law and that the plaintiff's complaint should be dismissed.

BACKGROUND

Prior to December 17, 1978, plaintiff was employed at HEW as Deputy Assistant Secretary for Grants and Procurement, GS-17 step 4, in the Office of the Assistant Secretary for Management

and Budget. On November 28, 1978, the Assistant Inspector General for Health Care and Systems Review, requested that Mr. Stone be transferred to the position of Senior Program Analyst, GS-15 step 10. (A.R. 18).

Plaintiff gave his written consent to this personnel action on December 6, 1978, "provided that the position described therein to which I am transferred is in the competitive service and is at step 10 of the specifed grade...or at any higher grade." (A.R. 19.) A notification of personnel action dated December 21, 1978, shows that the requested transfer was offically implemented as of December 17, 1978. (A.R. 2.)

Mr. Stone received notice of that action on January 16, 1979 and within two weeks filed a petition for appeal with the Washington Field Office of the MSPB[2]

alleging that the change to a lower grade was illegal because it was effected without prior notice to him, was without his consent, and because it was retroactive. (A.R. 1.) On April 18, 1979, the MSPB Washington Field Office ruled that it lacked jurisdiction to accept plaintiff's appeal. (A.R. 34-36.) The Appeals Officer found that plaintiff's statement of December 6, 1978, showed he had consented to the reduction in grade on two conditions, and that both conditions had been met. The Officer also found that plaintiff voluntarily accepted the change to a lower grade and did not claim that he was either induced or coerced into accepting

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2 The functions of the Office of Appeals Authority within the Civil Service Commission were transferred to the MSPB under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, which became effective on January 11, 1979.

the change.[3] The Officer then concluded that since Stone voluntarily accepted the change to a lower grade, his appeal was not within the purview of the Board's appellate jurisdiction under part 752-B of the Civil Service regulations as they existed before the 1979 Civil Service Reform Act became effective. 5 C.F.R. 752.201(b) (1974). (A.R. 34-36.) The Officer applied the earlier set of regulations because plaintiff's change to a lower grade was officially implemented on December 17, 1978, which was prior to the Civil Service Reform Act's effective date of January 11, 1979.

By letter dated April 2, 1980, Mr. Stone requested that the Board reopen and

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[3] Mr. Stone did not assert or claim anything to the contrary at the hearing on the cross-motions for summary judgment, July 2, 1984.

reconsider its decision of April 18, 1979. He was permitted to submit further arguments and documents in support of his request, and HEW was allowed to respond to his request. (A.R. 49, 50.) By letter dated June 5, 1981, the Board denied plaintiff's request to reopen the decision of April 18, 1979. It agreed with the Appeals Officer that the agency complied with the conditions in plaintiff's statement of consent and found no basis for reopening the initial decision. (A.R. 106-107.) Because Mr. Stone claimed that he had not received HEW's response to his request for reconsideration, he was afforded an opportunity to re-open the proceeding and submit a reply to the agency's response. By letter dated April 1, 1982, the MSPB informed plaintiff that it had considered his subsequent arguments and found no

basis for disturbing its decision of June 5, 1981. Mr. Stone was also informed that he had no further right to administrative review. (A.R. 114.)

Meanwhile, Mr. Stone had petitioned the United States Court of Appeals for the District of Columbia to review the Board's April 18, 1979 decision. On August 28, 1979, the Court of Appeals issued a per curiam order dismissing his petition for review. The Court ruled that personnel actions such as his, initiated prior to January 11, 1979, were decided under prior law, which did not permit review in the Court of Appeals. Kyle v. ICC, 609 F.2d 540, 542 (D.C. Cir. 1979).[4]

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[4] Plaintiff was one of several petitioners involving three federal agencies in the appellate proceeding: Paul A. Stone, Petitioner v. Dept. of Health, Education and Welfare, Respondent.

ANALYSIS

The plaintiff pursues this action under the Administrative Procedure Act, 5 U.S.C. §§ 704, 706 and statutes relating to government employees, Title 5 United States Code, Ch. 77; and specifically the statute concerning appeals of adverse decisions, 5 U.S.C. § 701. The court's review of this case involving a federal personnel action is limited to an examination of the administrative record to determine whether the agency's action was arbitrary or capricious, supported by substantial evidence, complied with all procedural requirements, and in accordance w applicable law. Doe v. Hampton, 510 F.2d 265, 271-272 n.15 and cases cited therein (D.C. Cir. 1977), Gueory v. Hampton, 510 F.2d 1222, 1225 (D.C. Cir. 1974), Roney v. Saxbe, 380 F. Supp. 1191 (D.D.C.

1974).

The plaintiff has noted several objections to the December 21, 1978 personnel actions: that it was not until January 16, 1979 when he received notice of the personnel action; that the action was illegal in that it was done without prior notice to him, without his consent and was retroactive, and; that personnel officials changed the job title for the position to which he had consented from "Senior Program Analyst" to "Program Analyst Officer." These objections, lacking in merit, are considered in the discussion which follows.

The lapse of nearly four weeks between the time that the personnel action was officially implemented -- December 21, 1978, and the time that Mr. Stone alleges that he was notified -- January 16, 1979, was not explained in any way by

the government. In the absence of any explanation, the lapse of time appears to be a display of bureaucratic negligence and indifference of which Mr. Stone has justifiable complaints. Indeed, at the motions hearing he expressed personal resentment and disappointment in receiving the tardy notice from HEW that the personnel action had been effected. Beyond that, he has made no claim, and there is no showing in the record, that this delay in any way otherwise prejudiced or adversely impacted upon him.

His claim that he was not afforded prior notice simply will not hold up. Indeed he did have prior notice and in fact consented to the proposed action. The initial request for the reduction in grade (A.R. 18) indicated tht it would be done ASAP (as soon as possible) and it was in fact officially implemented within

11 days on December 17, 1978. Stone's argument about the difference of 11 days between the date of his consent and the date of implementation of the action is puzzling at best. The 11-day interval does not appear to be unconscionable. He complains that the effective date of "12/17/78" was placed on the form after it was shown to him and that the change was made without his knowledge or approval. However, it is clear that the personnel action had to be implemented and officially recorded at some point in time.

In his moving papers and at oral argument, Mr. Stone made much of the fact that there was a difference in the job titles.[5] The November 28, 1978 proposal

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[5] At the motions hearing the plaintiff disclaimed any contention that the salary he received for the GS-10 position was an issue.

called for a job title of Senior Program Analyst and what was effected was a job title of Program Analyst Officer. However, at all times, and also acknowledged by Mr. Stone in the July 2, 1984 hearing, the job description was the same for the two positions. In short, the duties, responsibilities and special qualifications were identical for each position. And further, the position was in the competitive series. The government has explained that the change in job titles was necessary because such titles should conform to regularly approved job titles as set out in official government personnel manuals. The job title, Senior Program Analyst, was not such a title and a decision to change the title was made by personnel officials. However, the duties, responsibilities and qualifications and official job description for the

position were not in any way changed.

The record reflects that the Board declined to accept Mr. Stone's appeal for adjudication and a hearing because it concluded on the papers that he had voluntarily accepted a change to a lower grade. In doing so, it also found as to the plaintiff's allegations that HEW acted without prior notice and consent, were lacking in merit. From this Court's review of the record, the Board's decision was supported by substantial evidence. There is nothing to suggest that the decision was not supported by substantial evidence or that the decision was in any way arbitrary, capricious or otherwise procedurally incorrect. The alterations on the personnel form about which Mr. Stone complains were of little significance and reflect notations entered by the personnel staff of HEW in

the normal course of processing the plaintiff's change in grade.

When, as here, a federal employee consents to and voluntarily agrees to accept a transfer to a lower grade level, the controlling and relevant case law was declared in Christie v. United States, 518 F.2d 584 (Ct. of Cl. 1975) and Mc Gucken v. United States, 407 F.2d 1352 (Ct. of Cl. 1969). In Christie, the Court noted:

> Since the plaintiff has failed to present an adequate claim of coerced resignation, [the Civil Service Commission] properly declined to accept her appeal. Voluntary separations are not adverse actions and are thus not appealable to the [Commission]. See C.F.R. sec. 752-201(b).
>
> ....
>
> It would be folly to suggest that any time a hearing is requested, an agency must grant it. Yet, in effect, that is what plaintiff seems to imply. What plaintiff overlooks is that the legal classification of her

> separation is determinative of her entitlement to a hearing.... [E]mployees are entitled to a due process hearing if the Government initiates an adverse action to remove them. However, when an employee voluntarily relinquishes her property interest, her separation cannot be considered an adverse action. Since there was no adverse action in this case, a hearing is not required (citing Mc Gucken v. United States)....
>
> In summary, we hold the [Commission] properly declined to accept plaintiff's appeal because, as a matter of law, her resignation was voluntary. We further conclude [that the Commission's] denial of plaintiff's hearing request was proper.

518 F. 2d at 588.

CONCLUSION

Mr. Stone has not identified any substantive material facts which are in dispute nor has he provided any valid legal reasons why he is entitled to summary judgment or why the defendants are not entitled to judgment. Accordingly, his complaint should be dismissed.

Entered: July 26th, 1984

Barrington D. Parker

Barrington D. Parker

United States District Judge

Order of the United States District Court for the District of Columbia Entered July 26, 1984 Dismissing the Complaint [District Court docket entry No. 32, Court of Appeals Appendix, pp. 34-44]

FILED

JUL 26 1984

JAMES E. DAVEY, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL A. STONE,)
)
Plaintiff,)
)
v.)
)
MERIT SYSTEMS PROTECTION BOARD,)
)
Defendant.)

Civil Action No. 83-1706

ORDER

In accordance with the Memorandum

Opinion filed in this proceeding, it is this 26th day of July, 1984,

ORDERED

That summary judgment is granted for the defendantand the plaintiff's complaint be and it is hereby dismissed with prejudice.

Barrington D. Parker

Barrington D. Parker

United States District Judge

Oral Decision of the United States District Court for the District of Columbia to Grant Respondents' Motion for Summary Judgment, July 2, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

PAUL A. STONE,)

Plaintiff,)

v.)

MERIT SYSTEMS PROTECTION BOARD)

and DEPARTMENT OF HEALTH AND)

HUMAN SERVICES,)

Defendants.)

Civil Action No. 83-1706

FILED JUL 12 1984

CLERK, U.S. DISTRICT COURT

DISTRICT OF COLUMBIA

Washington, D.C.

Monday, July 2, 1984

The above-entitled action came on for cross-motions for summary judgment before the Honorable BARRINGTON D. PARKER, United States District Court Judge, in Courtroom No. 19, commencing approximately 12:40 o'clock, p.m.

APPEARANCES:

For the Plaintiff:

PAUL A. STONE, ESQ.

1116 Downs Drive

Silver Spring, Maryland 20904

(301) 622-2764

For the Defendants:

PATRICIA D. CARTER, ESQ.

Assistant United States Attorney

3810 United States Courthouse

Washington, D. C. 20001

(202) 633-2031

* * *

[pages 83-85]

* * *

THE COURT: Mr. Stone, I am going to rule on this case right now. I rule in favor of the Government.

Miss Carter, submit a proposed findings and conclusions with an order in this case. How much time do you want?

Today is what? Monday? Friday --

MS. CARTER: Wednesday is a holiday, Your Honor.

THE COURT: I know it is. That is why I gave you until Friday. I would have said Thursday.

MS. CARTER: I would appreciate it if I could do it sometime next week. I have depositions on Friday.

THE COURT: Oh, don't worry about depositions. This case comes before depositions.

I will give you until the ninth.

MS. CARTER: Thank you.

THE COURT: The ninth before 4 o'clock. File it in chambers.

MS. CARTER: Thank you, Your Honor.

THE COURT: Serve a copy on Mr. Stone.

Mr. Stone, the only thing that I can do is decide this case on the record before me. And, frankly, one thing that -- it seems to me that what you are disturbed over, the change in job description, the change in job title, there is no question of being a reduction in salary, there is no question about reduction in grade.

You have heard about the job title, you have heard about this whole question of retroactivity. In fact, it was sometime before you got it and then when you looked at it, the job became

effective December the 17th, as I recall, and you signed the consent on December the 6th. Is that right?

MR. STONE: Yes.

THE COURT: You didn't see the implementing papers until -- I think the papers were signed off on December the 21st, but it said it was effective December the 17th and you didn't see the implementing papers until sometime a month later, after December the 21st, sometime toward the end of January of the following year, and then you admit that you did see a job description which delineated the responsibilities and duties of the job and the responsibilities and duties of the job in no way differ from that which you were originally shown.

I will take a hard look at these regulations. I have just listened to

you.

Very well. This transcript will be helpful to the Court, too.

THE DEPUTY MARSHAL: All rise.

This Honorable Court stands adjourned.

[Whereupon, at 4:21 p.m. the above-entitled action was concluded.]

Covering Letter of Merit Systems Protection Board Decision on Petitioner's Appeal [Administrative Record, p. 33, Court of Appeals Appendix, p. 59]

MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. Region
Washington, D.C. 20419

APR 18, 1979

Mr. Paul A. Stone
Department of HEW
300 Independence Ave., S.W.
Room 5652
Washington, D.C. 20201

There is transmitted herewith a copy of my findings and recommendation in the appeal described below:

APPEAL OF: Paul A. Stone
ACTION APPEALED: Change to Lower Grade
EMPLOYING AGENCY: Department of HEW

DECISION: Not within purview

Sincerely yours,

Thomas J. Lanphear

Chief Appeals Officer

cc: Ronald Brooks
Acting Director
Division of OS Personnel
Department of HEW
Office of the Secretary
Washington, D.C. 20201

cc: Director Personnel Policy Division
Office of Personnel and Training
Department of HEW, Transpoint Building
330 Independence Ave., S.W. Room B110
Washington, D.C. 20201

Enclosure

Merit Systems Protection Board Decision on Petitioner's Appeal [Administrative Record, pp. 34-36, Court of Appeals Appendix, pp. 60-64]

MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. Region
Washington, D.C. 20419

APPEAL OF PAUL A. STONE
UNDER PART 752, SUBPART B OF THE CIVIL SERVICE REGULATIONS
DECISION NUMBER DC752B90198
DECIDED ON APR 18 1979

INTRODUCTION

By undated letter, received in this office on January 29, 1979, Mr. Paul A. Stone submitted an appeal to the Merit Systems Protection Board from the action of the Department of Health Education and

Welfare (DHEW), changing him from the position of Deputy Assistant Secretary for Grants and Procurement, GS-301-17, Step 4, Office of the Secretary, Management and Budget Office, DHEW, Washington, D.C. to the lower grade position of Program Analyst Officer, GS-345-15, Step 10, Office of the Secretary, Office of the Inspector General, DHEW, Washington, D.C., effective December 17, 1978.

JURISDICTION

The agency has presented information showing that by Standard Form 52, Request for Personnel Action, dated November 28, 1978, it proposed appellant's change from his Deputy Assistant Secretary for Grants and Procurement, GS-17, Step 4, position in the competitive service to the lower grade position of Program Analyst Officer, GS-15, Step 10, in the competitive

service effective December 17, 1978. In addition it introduced into evidence the following statement signed by the appellant on December 6, 1978:

> "I consent to the personnel action requested in the Request for Personnel Action dated November 28, 1978, a copy of which is attached hereto, provided that the position described therein to which I am transferred is in the competitive service and is at step 10 of the specified grade (see item 22) or at any higher grade."

Since Mr. Stone's change to a lower grade was effected prior to January 11, 1979 he would have a right to appeal any involuntary adverse action covered under part 752-B of the Civil Service regulations as it existed before the Civil Service Reform Act, PL 95-454, 95th Congress, became effective. These actions were: (1) Removal; (2) Suspension for more than 30 days; (3) Furlough without pay; and (4) Reduction in rank or pay. In his

appeal, Mr. Stone did not allege that he was either induced into accepting the change or was coerced into accepting it. He alleged only that since a copy of the personnel action form effecting the change to a lower grade did not reach him until January 16, 1979, the action was illegal because: "a. It was done without prior notice to me and without my consent. b. It is retroactive." Both of these allegations are without merit. His December 6, 1978 statement clearly shows that the action met with his consent provided the agency met two conditions, namely: he be given a position at grade GS-15, Step 10, or higher; and the position be in the competitive service. The agency met both of these conditions. His statement also shows that he was clearly familiar with the November 28, 1978 Request for Personnel Action which

showed the effective date of the proposed action to be the same date on which it was effected - that is, December 17, 1978. We conclude, therefore, that appellant voluntarily accepted a change to a lower grade, and that his appeal is not within the purview of our appellate jurisdiction under part 752B of the Civil Service regulations.

DECISION

For the reasons stated above, we decline to accept this appeal for adjudication.

The decision of the appeals officer is final and there is no further right of appeal. This means that the decision of the appeals officer marks the exhaustion of those administrative remedies which must precede resort to the courts. However, sections 772.310 and 772.312 of

Title 5, Code of Federal Regulations, permit the Board, in its discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider any previous decision of an appeals officer when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued;

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy;

(3) The decision of the appeals

officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand; or

(4) The decision of the appeals officer involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Board members.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit that information and, where appropriate, evidence of temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If the appellant has evidence or argument

which he believes meets one or more of these criteria, he must submit that information within a reasonable time after receipt of this decision.

Such request should be sent to:

Director
Office of Appeals Review
Merit Systems Protection Board
Washington, D.C. 20419

For the Board:

William M. Rickman
Appeals Officer

A.54

Merit Systems Protection Board Response Dated May 9, 1980 to Petitioner's April 2, 1980 Letter Suggesting that it Reexamine its Decision [Administrative Record, p. 50, Court of Appeals Appendix, pp. 68-69]

MAY 9 1980

Mr. Paul A. Stone
Department of Health, Education & Welfare
300 Independence Ave., S.W. (Rm. 5650)
Washington, D.C. 20201

Dear Mr. Stone:

This will acknowledge receipt of your April 2, 1980 communication, indicated as a request for reopening and reconsideration of the April 18, 1979 decision of the Washington, D.C. Field Office.

In a request for reopening, the Board

makes its determination based on the criteria set out in the last paragraphs of the Field Office decision, review of the appellate record, and any written arguments and/or evidence in support of the request. You are hereby given an extension of time of ten (10) calendar days from receipt of this letter to make a submission transmitting any further arguments and/or documents as you may wish to have considered in support of the request for reopening.

In addition, such requests for reopening and reconsideration must be submitted to the Board within a reasonable time after receipt of the Field Office decision. The request in the instant case was not submitted by you until April 2, 1980. Under the circumst[an]ces, it appears that the request may be untimely and

cannot be accepted for processing.

In view of the above, we are also hereby providing you with an opportunity to furnish the Board any written statements or evidence you wish to submit justifying the delay. You are hereby granted the above period of ten (10) calendar days from the date you receive this letter in which to reply. Upon receipt of your reply, the Board will review the representations submitted, and will determine whether the facts and circumstances warrant the acceptance of the reopening request for consideration. Absent a valid showing that such delay was justified, the Board may consider your request to be untimely for failure to exercise due diligence in pursuing your reopening request.

Sincerely yours,

F.W. Palmquist 5/8/80

for Cameron C. Smith, Director

Office of Appeals

Merit Systems Protection Board Letter Dated June 5, 1981 Denying Petitioner's Request to Reopen the Board's Decision

[Administrative Record, pp. 106-107, Court of Appeals Appendix, pp. 79-80]

JUN 5 1981

Mr. Paul A. Stone
Department of Health, Education & Welfare
300 Independence Ave., S.W.
Washington, D.C. 20201

Dear Mr. Stone:

This is in response to your letter of April 2, 1980, requesting that the Board reopen and reconsider the April 18, 1979, decision of the Washington, D.C., Field Office. On May 28, 1980, you responded to the Board's request to furnish written statements or evidence to

justify the delay in requesting reopening of that decision. A copy of your request was forwarded to the agency for comment and rebuttal and the agency submitted their comments by letter of June 26, 1980.

The record reflects that effective December 17, 1978, you were changed from your Deputy Assistant Secretary for Grants and Procurement, GS-17, Step 4, position in the competitive service to the lower-grade position of Program Analyst Officer, GS-15, Step 10, in the competitive service. In its decision of April 18, 1979, the Washington, D.C., Field Office found that you had voluntarily accepted a change to a lower grade and that, therefore, it lacked jurisdiction to accept the appeal. In your letter of May 28, 1980, you set out your

reasons for disagreeing with the Appeals Officer's finding. You argue that you did not consent to a change to the position entitled Program Analyst Officer nor to the effective date of December 17, 1978, and that the SF 52 submitted by the agency was materially altered without your approval. HEW contends that the SF 52 contains the usual entries and alterations made in the course of processing through the personnel office.

We agree with the presiding official that the agency complied with the conditions specified in your consent statement of December 6, 1978. There was no deception on the part of the agency. Therefore, the Board has no basis for reopening your appeal under the regulatory criteria of 5 C.F.R. sections 772.310 or 772.312. The request to reopen the Field

Office decision of April 18, 1979, is denied, and the decision remains the final decision in this matter.

There is no further right of administrative appeal from a decision of the Merit Systems Protection Board on a request for reopening. This case is considered to be closed in this office since all administrative appeal rights have been exhausted. Any further remedy lies in the federal court system.

For the Board:

Sincerely yours,

David C. Kane, Acting Director
Office of Appeals

cc:

Ronald Brooks

A.62

Acting Director
Division of OS Personnel
Department of HEW
Office of the Secretary
Washington, D.C. 20201

Director, Personnel Policy Division
Office of Personnel and Training
Department of HEW, Transpoint Bldg.
330 Independence Ave., S.W., Room B110
Washington, D.C. 20201

OA:TLANPEAR:ljm:4/7/81

Merit Systems Protection Board Letter Replying to Petitioner's June 22, 1981 Request for Rescission of Board's June 5, 1981 Decision on Request for Reopening and Reconsideration [Administrative Record, p. 111, Court of Appeals Index, p. 81]

U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

Dear Mr. Stone:

This is in response to your letter dated June 22, 1981, requesting that the Board rescind its denial of your request to reopen the Field Office decision of April 18, 1979, because you never received a copy of the agency's response dated June 26, 1980. The Board will consider your arguments based on that response if submitted by October 13,

1981. Failure to respond by that date will result in a denial of your reconsideration request.

Sincerely yours,

David C. Kane, Acting Director
Office of Appeals

Enclosure

cc:

Ronald Brooks
Acting Director
Division of OS Personnel
Department of HEW
Office of the Secretary
Washington, D.C. 20201

Director, Personnel Policy Division
Office of Personnel and Training
Department of HEW, Transpoint Bldg.

330 Independence Ave, S.W., Room B110

Washington, D.C. 20201

A.66

Merit Systems Protection Board Letter Dated April 1, 1982 Replying to Petitioner's Letter Dated October 12, 1981 in Support of Request for Reopening and Reconsideration of Board's Decision

[Administrative Record, pp. 114-115, Court of Appeals Appendix, pp. 85-86]

APR 1 1982

Mr. Paul A. Stone
Department of Health and Human Services
300 Independence Avenue, S.W.
Room 5650
Washington, D.C. 20201

IN THE MATTER OF:
Paul A. Stone v. Dept. of HEW
Decision No. DC752B90198
Date: April 18, 1979

Dear Mr. Stone:

On June 5, 1981, the Board denied your request to reopen and reconsider the April 18, 1979, decision of the Washington, D.C. Regional Office. On June 22, 1981, you alleged that you had never received a copy of the agency's response to your reconsideration request. The Board sent you a copy of that response and offered you an opportunity to submit further argument. You responded by letter dated October 12, 1981.

As you were informed in the Board's letter of June 5, 1981, the decision of the regional office constituted the final decision in this matter. However, the Board gave you the opportunity to respond to the agency's response because you had never received a copy of that letter. We have considered your arguments and find that they offer no basis upon which to

disturb the decision of June 5, 1981.

There is no further right to administrative review in this matter. Any additional review which may be available lies in the federal court system.

While I regret the nature of this reply, I hope this information will be helpful to you.

Sincerely,

Roscoe E. Long

Roscoe E. Long, Acting Director
Office of Appeals

cc:

Ronald Brooks
Acting Director
Division of OS Personnel

Department of Health & Human Services
Office of the Secretary
Washington, D.C. 20201

Director, Personnel Policy Division
Office of Personnel and Training
Department of Health & Human Services
Transpoint Bldg.
330 Independence Ave., S.W., Room B110
Washington, D.C. 20201

OFFICIAL FILE COPY

Merit Systems Protection Board Letter of December 14, 1982 Replying to Petitioner's Letters Dated April 20, October 20 and November 23, 1982

[Administrative Record, p. 118, Court of Appeals Appendix, p. 98]

Mr. Paul A. Stone
Department of Health and Human Services
300 Independence Avenue, S.W.
Room 5650
Washington, D.C. 20201

Dear Mr. Stone:

This is in reference to your letters dated April 20, October 20, and November 23, 1982, to the Chairman, Merit Systems Protection Board requesting reopening and reconsideration of your appeal.

On June 5, 1981, the Board denied

your request to reopen the Field Office decision of April 18, 1979, because the request did not meet the regulatory criteria of 5 C.F.R. §§ 772.310 or 772.312 (1979). That decision was the final decision of the Board. As stated in the decision, you have exhausted your administrative remedies and any further relief lies in the federal court system.

I hope this information will be of assistance to you.

Sincerely,

Robert T. Taylor,

Secretary

Order of the United States Court of Appeals for the District of Columbia Circuit Filed July 19, 1985 Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5678 September Term, 1984

CA No. 83-01706

United States Court of Appeals

for the District of Columbia Circuit

FILED JUL 19 1985

GEORGE A. FISHER

CLERK

Paul A. Stone,

Appellant

v.

Merit Systems Protection Board

BEFORE: Wald and Scalia, Circuit Judges,

and McGowan, Senior Circuit Judge

O R D E R

Upon consideration of the petition for rehearing of appellant Paul A. Stone, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER, CLERK

BY: Robert F. Bonner

Robert A. Bonner

Chief Deputy Clerk

CONSTITUTION OF THE UNITED STATES OF AMERICA, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 5, UNITED STATES CODE (ED. 1976), SECTIONS 7511-7512

§ 7511. Definitions

For the purpose of this subchapter [sections 7511 and 7512]--

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia, but does not include an employee whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the Senate; and

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

§ 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to--

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title.

TITLE 5, UNITED STATES CODE (ED. 1976), SECTION 7701

§ 7701. Appeals of preference eligibles

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommen-

dations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends.

A.80

EXECUTIVE ORDER 10988, JANUARY 17, 1962, 3 CFR (1959-1963 COMPILATION), PAGES 521-528

* * *

[527]

SEC 14. The head of each agency, in accordance with the provisions of this order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles under section 14 of the Veterans' Preference Act of 1944, as amended. Each employee in the competitive service shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be processed in an

identical manner to that provided for appeals under section 14 of the Veterans' Preference Act. Any recommendation by the Civil Service Commission submitted to the head of an agency on the basis of an appeal by an employee in the competitive service shall be complied with by the head of the agency. This section shall become effective as to all adverse actions commenced by issuance of a notification of proposed action on or after July 1, 1962.

* * *

5 CFR (ED. 1978) PART 772--APPEALS TO THE COMMISSION

Subpart C--Commission's Appellate Review of Actions Against Employees

§ 772.301 Coverage.

(a) Agency-initiated actions. Except as otherwise provided, this subpart applies to appeals to the Federal Employee Appeals Authority (hereinafter referred to as the Appeals Authority) under Subpart H of Part 315 of this chapter, Subpart B of Part 330 of this chapter, Subpart I of Part 351 of this chapter, Subparts B, C, E and F of Part 352 of this chapter, Subpart D of Part 353 of this chapter, Subparts D and E of Part 531 of this chapter, and Subparts B and C of Part 752 of this chapter.

(b) Commission-initiated actions. * *

*

§ 772.302 Time limit for appeal.

* * *

§ 772.303 Failure to prosecute.

* * *

§ 772.304 Death of appellant.

* * *

§ 772.305 Evidence.

(a) Affidavits. Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision. It is the responsibility of both parties to the appeal to submit all evidence to the appropriate office of the Appeals Authority having jurisdiction.

(b) Availability of evidence and representations. A representative of the Appeals Authority shall discuss all relevant representations and evidence with

both parties and make the representations and evidence available to them for review. However, when adverse action has been taken, or decision on an application for disability retirement has been made, on the basis of the reported mental condition of the appellant or another condition of such a nature that a prudent physician would hesitate to inform a person suffering from it as to its exact nature and probable outcome, the representative of the Appeals Authority shall make the medical evidence available only to a duly licensed physician designated in writing by the appellant or the appellant's representative.

§ 772.306 Allegations of discrimination

* * *

§ 772.307 Hearings.

(a) Coverage. This section applies only to appeals under Subpart B of Part 752 of this chapter, Part 754 of this chapter, and Subpart L of Part 831 of this chapter.

(b) Right to a hearing. An appellant is entitled to a hearing before the office of the Appeals Authority having jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

(c) Hearing procedures. (1) An appellant is entitled to appear at the hearing on his/her appeal personally or through or accompanied by a representative. The agency also is entitled to participate in the hearing. The employee will desig-nated [sic] his/her representative, if any, in writing to the Federal Employee

Appeals Authority, with a copy of the designation provided to the agency. Any subsequent changes in representative also will be in writing. While normally an appellant may choose anyone he/she wishes to serve as representative, the agency may challenge the appellant's choice of representative before the appeals officer on the grounds of conflict of position or conflict of interest. Such a challenge must be made within 10 days after receipt of the notice of designation of representative and must be disposed of before consideration of the merits of the case. If the appellant changes his/her representative during the course of the proceeding, the agency will be given an opportunity to challenge the new selection. There shall be no interlocutory appeals from the appeals officer's determination with regard to such a challenge.

(2) Both parties are entitled to produce witnesses and to introduce signed sworn statements or letters of interrogatory. The Appeals Authority is not authorized to subpoena witnesses. Any agency that has employees entitled to appeal to the Appeals Authority under this part shall make its employees available to furnish sworn statements or to appear as witnesses at the hearing when requested by the Appeals Authority after consideration of a request by either party to the appeal, unless it is administratively impracticable to comply with the request of the Appeals Authority. In the event that a witness requested by the Appeals Authority is employed by a Federal agency other than the appellant's agency, the witness shall be made available by the employing agency with appropriate reimbursement by the appellant's agency,

unless the Appeals Authority concurs in a determination of administrative impracticability. If the employing agency determines that it is not administratively practicable to comply with the request of the Appeals Authority, it shall submit to the Appeals Authority its written reasons for the declination. If the appeals officer determines that the reason for the declination is adequate, the appeals officer shall insert the explanation in the record, notify the requesting party that the witness(es) will not be provided and of the reason therefor and, when appropriate, inform both parties to the appeal of the procedures under which a signed sworn statement or letter of interrogatory will be obtained from the witness(es). If the appeals officer deems the reasons inadequate, and further determines that the

requested witness is likely to possess special or peculiar knowledge about the matters in dispute, the appeals officer, may, in assessing the totality of evidence in the case, infer that the absent witness would have given testimony unfavorable to the employing agency. Federal employees shall be in an official duty status for all purposes in connection with their provision of sworn statements or their appearance as witnesses and shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(3) An appeals officer of the Appeals Authority shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the appellant, his representative, representatives of the agency, and witnesses), and to cross-

examine witnesses. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the appeals officer shall exclude irrelevant or unduly repetitious testimony. The appeals officer may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(4) Except as provided in paragraph (c)(5) of this section, attendance at the hearing will be limited to persons determined by the appeals officer to have a direct connection with the appeal.

(5) When requested by the appellant and the agency does not object, the appeals officer shall hold a public hearing. When the agency objects, the appeals officer may deny the appellant's request only when he determines this action to be in the best public interest. The appeals officer in his discretion, may close one

or more sessions of a public hearing, when he determines that this action is in the best interest of the appellant, a witness, or the Government. The reasons for the appeals officer's decision to deny a request for a public hearing or to close one or more sessions of a public hearing shall be made a part of the record.

(6) The hearing is reported verbatim. The transcript is part of the record of the proceedings and a copy of the transcript shall be furnished to each party. [39 FR 32545, Sept. 9, 1974, as amended at 41 FR 48110, Nov. 2, 1976]

§ 772.308 Closing the record.

(a) The Appeals Authority shall close the record in any case after the parties to the appeal have had a full opportunity to present any and all relevant and mate-

rial evidence. When there is a hearing, the record shall be closed at the conclusion of the hearing except that the appeals officer has discretion to permit the parties to submit written argument or briefs after the record is closed.

(b) When the record is closed there is no right to submit additional evidence into the record.

§ 772.309 Decision on appeal.

(a) The office of the Appeals Authority having initial jurisdiction of the appeal shall issue a written decision and send copies thereof to the appellant, his representative, and the agency. The decision on each appeal covered by this part shall contain an analysis of the evidence, findings, a statement of the reasons for the conclusions reached, and recommendation for any corrective action

required. The agency shall report, within 30 calendar days after receipt of the decision, that it has carried the decision into effect or that it is petitioning the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.

(b) The decision of the appeals officer is final and there is no further right of appeal.

§ 772.310 Reopening and reconsideration by the Appeals Review Board.

(a) Request for reopening and reconsideration. Either party may request the Appeals Review Board (hereinafter referred to as "Board") to reopen and reconsider any previous decision of an appeals officer. The Board may reopen and reconsider the decision when the party requesting reopening submits writ-

ten argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued;

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

(b) Limitations on agency request to reopen. (1) An agency may not request the Board to reopen and reconsider a decision of an appeals officer when that decision reverses an original decision of the Commission under Part 731 or Part 754 of this chapter.

(2) The Board may not consider an agency request to reopen and reconsider a decision of an appeals officer after the agency has complied with the recommended corrective action.

(3) A request by an agency to reopen and reconsider a decision of an appeals officer shall be filed no later than 30 days after receipt of the appeals officer's decision.

(c) Where to file. Requests to reopen and reconsider a decision of an appeals officer shall be filed with the Appeals Review Board, U.S. Civil Service Commission, Washington, D.C. 20415.

(d) How to file. A request to reopen and reconsider a decision of an appeals officer shall be in writing and set forth in detail the reasons for the request.

(e) Impact of a request to reopen upon the previous decision. (1) When an em-

ployee or agency requests the Board to reopen and reconsider a decision of an appeals officer affirming an original adverse decision of the Commission under Part 731 or Part 754 of this chapter, or a decision of an appeals officer affirming or reversing the original adverse decision of the Bureau of Retirement, Insurance and Occupational Health under Subpart L of Part 831 of this chapter, that decision may not be given effect pending decision by the Board.

(2) An agency request for reopening under paragraph (a) of this section shall stay the corrective action recommended by the appeals officer except in those cases where the appeals officer has recommended:

(i) The retroactive restoration of an employee who was removed under Subpart B of Part 752 of this chapter, Part 351 of

this chapter or Subpart H of Part 315 of this chapter.

(ii) The cancellation of an indefinite suspension under Subpart B of Part 752 of this chapter.

The immediate action in such cases shall be a temporary appointment, a temporary restoration to duty status to a position of like grade or pay, or a similar conditional action pending decision of the Board on the case. Evidence of temporary or conditional compliance with the appeals officer's recommended corrective action must accompany the agency's request for reopening to the Board under paragraph (e)(1) or (2) of this section. However, service by the employee under the provisions of this paragraph may not be credited toward the completion of a probationary or trial period, eligibility

for a within-grade increase, or the completion of the service requirement for career tenure.

(f) Board procedures. The Board shall review any request to reopen to determine whether a basis for reopening under § 772.310(a) has been established. When the Board determines that the request does not establish a basis for reopening the Board shall notify the requesting party in writing of its decision to deny the request. When the Board reopens a previous decision, the Board will determine and conduct whatever further investigation is necessary. There is not right to a hearing before the Board. The Board may, in its discretion, afford the parties an opportunity to appear personally and present oral argument and representations.

(g) Reconsideration decision of the

board. When the Appeals Review Board has reopened an appeals officer's decision for reconsideration, it shall review the record of the proceedings and all written representations. The board shall issue a written decision and shall send copies thereof to the parties and to the employee's representative. The decision of the board is final. When corrective action is recommended, the agency shall report promptly to the board that the corrective action has been taken.

§ 772.311 Board procedures in appeals directly to the Board

* * *

§ 772.312 Review by the Commissioners.

(a) The Commissioners may, in their discretion, reopen and reconsider any previous decision on their own motion or when the party requesting reopening sub-

mits written argument or evidence which tends to establish that:

(1) The previous decision of the Board on a request to reopen and reconsider involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Commissioners; * * *

5 CFR (ED. 1978) PART 752--ADVERSE ACTION BY AGENCIES

Subpart A--General Provisions

§ 752.101 Applicability.

This part applies to removals, suspensions, furloughs without pay, and reduction in rank or pay of employees of the Government of the United States and the government of the District of Columbia.

[citations]

§ 752.102 Definitions.

* * *

§ 752.103 General exclusions

§ 752.104 General standards.

(a) An agency may not take an adverse action against an employee covered by

this part except for such cause as will promote the efficiency of the service. * * *

Subpart B--Removal, Suspension for More Than 30 Days, Furlough Without Pay, and Reduction in Rank or Pay

§ 752.201 Coverage

(a) Employees covered. This subpart applies to:

(1)(i) Any career, career conditional overseas limited, indefinite or term employee, or any employee serving under a career executive assignment, in a competitive position who is not serving a probationary or trial period and (ii) * * *

§ 752.202 Procedures.

(a) Notice of proposed adverse action.

(1) Except as provided in paragraph (c) of this section [furloughs without pay due to unforeseeable circumstances], an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons specifically and in detail, for the proposed action.

(2) * * *

(1) Employee's answer. Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. * * *

§ 752.203 Right of appeal to the Commission

An employee is entitled to appeal to the Commission from an adverse action

covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is able to submit.

(a) Time limit for appeal. * * *

(b) Finality of the decision. The decision of the office of the Commission having appellate jurisdiction is final. However, either party to the appeal may petition the Appeals Review Board to reopen and reconsider the decision under § 772.310 of this chapter.
[citation]

* * *

CIVIL SERVICE REFORM ACT OF 1978,
PUBLIC LAW 95-454, SECTION 902,
92 STAT. 1111, 1223

SEC. 902. (a) Except as otherwise provided in this Act, all executive orders, rules, and regulations affecting the Federal service shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed by the President, the Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority with respect to matters within their respective jurisdictions.

(b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken

therefrom as if this Act had not been enacted.

(c) No suit, action, or other proceeding lawfully commenced by or against the Director of the Office of Personnel Management or the members of the Merit Systems Protection Board, or officers or employees thereof, in their official capacity or in relation to the discharge of their official duties, as in effect immediately before the effective date of this Act, shall abate by reason of the enactment of this Act. Determinations with respect to any such suit, action, or other proceeding shall be made as if this Act had not been enacted.

First Page of Petitioner's December 6, 1978 Consent [Administrative Record, p. 40, Court of Appeals Appendix, p. 45]

December 6, 1978

I consent to the personnel action requested in the Request for Personnel Action dated November 28, 1978, a copy of which is attached hereto, provided that the position described therein to which I am transferred is in the competitive service and is at step 10 of the specified grade (see item 22) or at any higher grade.

Paul A. Stone

A.108

First Page and Certificate of Service of Petitioner's Petition for Appeal to Respondent Merit Systems Protection Board

[Administrative Record, p. 1, Court of Appeals Appendix, p. 47]

RECEIVED
1979 JAN 29 AM 11:05
FEDERAL EMPLOYEE
APPEALS AUTHORITY
WASHINGTON, D.C.
FIELD OFFICE

MERIT SYSTEMS PROTECTION BOARD

APPEAL OF PAUL A. STONE

PETITION FOR APPEAL

1. I appeal from an action of Thomas M. King, Director, Division of Office of the Secretary Personnel, of the Department of Health, Education, and Welfare.

2. The action appealed from is the

action set forth in a notification of personnel action a copy of which is Exhibit 1 hereto.

3. I received this notice of personnel action on January 16, 1979.

4. The action appealed from is illegal because:

a. It was done without prior notice to me and without my consent.

b. It is retroactive.

Paul A. Stone

Paul A. Stone

Department of Health,
Education, and Welfare
300 Independence Avenue,
S.W. - room 5652
Washington, D.C. 20201

CERTIFICATE OF SERVICE

On January 23, 1979 I served this petition for appeal on Thomas M. King, the party named in paragraph 1 thereof, by leaving it at his office, 300 Independence Avenue, S.W. - room 4361, Washington, D.C. 20201, with a person of suitable age and discretion.

Dated: January 23, 1979

Paul A. Stone

Declaration in Support of Petitioner's Objection to the Memorandum Opinion Proposed to the District Court by Respondents [Court of Appeals Appendix, pp. 32-33]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Paul A. Stone,

Plaintiff,

v.

Merit Systems Protection Board et al.,

Defendants.

Civil Action No. 83-1706

PLAINTIFF'S DECLARATION IN SUPPORT OF OBJECTION TO PROPOSED MEMORANDUM OPINION

I hereby state under penalty of perjury:

1. I was not notified of, and had no knowledge whatever, of any communica-

tion, in either direction, between the Merit Systems Protection Board ("Board") and the Department of Health and Human Services ("HHS") (or Department of Health, Education, and Welfare) about my January 1979 appeal to the Board until I received a copy of the Board's already issued decision dated April 18, 1979.

2. Attached hereto is a copy (versos inverted) of Federal Personnel Manual Supplement 752-1 as in effect throughout 1978 and until January 10, 1979. I made this copy from a copy in the library of the HHS Office of the Assistant Secretary for Personnel. To ensure its correctness, I compared the installment numbers on all the pages with those on a copy shown to me in the library of the Office of Personnel Management ("OPM"). The only difference I observed is that one of

the OPM pages, a photocopy, lacked an installment number. I compared that page word for word without seeing any difference. Of course, the handwritten notations on the HHS copy did not appear on the OPM copy.

Dated: July 16, 1984

Paul A. Stone
Paul A. Stone
Plaintiff